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RESEARCH ARTICLE

Servitude, slavery and Scots law: historical perspectives on the Human Trafficking and Exploitation (Scotland) Act 2015

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Abstract
Section 4(1)(a) of the Human Trafficking and Exploitation (Scotland) Act 2015 states that it is an offence for any person to hold another person in servitude or slavery. In February 2018, John Miller and Robert McPhee appeared at the High Court in Glasgow, charged on indictment with this offence. In defining both 'servitude' and 'slavery', the court was obliged, per s 4(2) of the 2015 Act, to have due regard to the understanding of these terms which has evolved out of the jurisprudence of Article 4 of the European Convention on Human Rights (ECHR). 'Slavery', then, was said to denote 'the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised'. If, however, the definition of 'slavery' necessarily 'involves rights of ownership', then it follows that any enactment of law specifically proscribing slavery is nugatory. Indeed, in *Miller*, the court ultimately held that 'there was no evidence upon which they could hold that the complainer had been held in a state of slavery'. This paper consequently asks whether or not in passing s 4(1)(a) of the 2015 Act, Parliament criminalised an impossible action.

Keywords: slavery; Scots law; human rights; property; persons; astriction

Introduction

Section 4(1)(a) of the Human Trafficking and Exploitation (Scotland) Act 2015 states that it is an offence for any person to hold another person in servitude or slavery.[1] In February 2018, John Miller and Robert McPhee appeared at the High Court in Glasgow, charged on indictment with this offence.[2] The co-accused were duly convicted of the charge of holding another person in servitude (inter alia), but the initial libel of 'slavery' was removed, by the trial judge, from the jury's consideration.[3] In defining both 'servitude' and 'slavery', the court was obliged, per s 4(2) of the 2015 Act, to have due regard to the understanding of these terms which has evolved out of the jurisprudence of Article 4 of the European Convention on Human Rights (ECHR).[4] 'Slavery', then, was said to denote 'the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised'.[5] Thus, it was concluded that 'the definition of slavery involves … rights of

[1]The wording of this section is identical to s 47(1)(a) of the Criminal Justice and Licensing (Scotland) Act 2010 (now repealed).

[2]See *Miller v HM Advocate* [2019] HCJAC 7.

[3]*Miller*, above n 2, para 1.

[4]*Miller*, above n 2, para 8; Art 4(1) of the ECHR posits that 'no one shall be held in slavery or servitude'.

[5]*Miller*, above n 2, para 8; the wording of this definition is taken from Art 1 of the Convention on Slavery, 9 March 1927, 60 LNTS 253. This is the 'classic' definition of slavery, approved of by the European Court of Human Rights per *Siliadin v France* (Application no. 73316/01) 26/10/2005, para 122. As indicated by that court in *M and Others v Italy and Bulgaria*

ownership'[6] and that, as a result of this, 'there was no evidence upon which they could hold that the complainer had been held in a state of slavery'.[7]

If, however, the definition of 'slavery' must be understood as necessarily involving the 'powers' arising from 'rights of ownership' – that is, in the Scottish context, a legal relationship of *dominium* between the owner and the slave[8] giving rise to powers of disposal, use and abuse of the 'thing' owned, as well as legal claims to the fruits produced by the labour of the 'thing'[9] – it is difficult to see how any private individual can actually commit the offence of holding another person as a slave within the context of the 2015 Act.[10] Historically, Scots law has refused to countenance the institution of slavery.[11] As early as 1687, in the case of *Reid v Scot of Harden and his Lady*,[12] the Court of Session held that 'we have no slaves in Scotland, and mothers cannot sell their bairns'. Though this juridical pronouncement was seemingly forgotten in practice for much of the eighteenth century,[13] in the 1778 case of *Knight v Wedderburn*[14] it was firmly[15] established that Scots law did not recognise the lawfulness of slavery as an institution.[16] If the law does not recognise that it is possible for one human being to own another – and Scots law has certainly not recognised this for centuries, if it ever formally did[17] – and if the definition of slavery necessarily 'involves rights of ownership',[18] then it follows that any enactment of law specifically proscribing slavery is nugatory.[19]

This paper consequently asks whether or not in passing s 4(1)(a) of the 2015 Act (and thus its predecessor, s 47(1)(a) of the Criminal Justice and Licensing (Scotland) Act 2010) Parliament criminalised an impossible action. In answering this question, this paper considers the significance that

(2013) 57 EHRR 29 para 149, for a human being to be a 'slave' within the meaning of Art 4 of the ECHR, they must be 'reduce[d] to an object' over which a 'genuine right of ownership' is exercised by another.

[6]*Miller*, above n 2, para 8.

[7]*Miller*, above n 2, para 9.

[8]'*Dominium*', or 'ownership', being 'the sovereign or primary real right': see Erskine *Institute* 2, 1, 1. Scots property law – to the 'surprise' of Lord Hobhouse as recorded in the case of *Burnett's Trustee v Grainger* 2004 SC (HL) 19 – 'is still [in the twenty-first century] based on the judicial development, albeit sophisticated, of the laws of Rome', hence the later importance of Roman law to the development of this paper.

[9]See eg *Alves v Alves* (1861) 23 D 712 and DL Carey Miller and D Irvine *Corporeal Moveables in Scots Law* (Edinburgh: W Green and Sons, 2005) para 1.12.

[10]This is not so because, as some contend, we *should not* elevate 'one of the ugliest of human perversities, slavery, to the status of "law"' as slavery is not and cannot be a legal relationship (see JM Miller's review of A Watson's *Roman Slave Law* (1988) Legal Stud F 389 at 389–391) but rather because the law as it presently stands in Scotland *does not* elevate the 'perversity' of 'slavery' to the status of 'law'.

[11]Although it is said here that Scots *law* refused to countenance the institution of slavery, it is plain that the Scottish nation and people did 'vigorously' engage in – and 'benefit' from – colonial slavery. Throughout the eighteenth century, slaves from the colonies were routinely brought to the shores of Scotland – and thus nominally brought under the jurisdiction of Scots law – without undergoing any practical change in status: see JW Cairns 'Stoicism, slavery and law: Grotian jurisprudence and its reception' (2001) Grotiana at 216–217.

[12](1687) Mor 9505.

[13]See eg the controversy surrounding cases such as *Sheddan v a Negro* (1757) Mor 14545, *Stewart Nicholson v Stewart Nicholson* (1771) and *Spens v Dalrymple* (1770), each of which concerned purported 'slaves' acquired in British colonies and each of which was seen as giving rise to sufficiently complex legal issues so as to merit litigation and debate in spite of the ruling in *Reid*.

[14](1788) Mor 14545.

[15]See the discussion in JW Cairns 'John Millar and slavery' in N Walker *MacCormick's Scotland* (Edinburgh: Edinburgh University Press, 2010) pp 102–103.

[16]See the lectures of Professor John Miller in the late eighteenth century, wherein it is noted that 'the judges [in *Knight*] were clearly and decidedly of opinion, that slavery was contrary both to the law of nature, and the municipal law of this country': GUL, MS Gen. 243, 60.

[17]As Cairns notes, there were at least two occasions, prior to 1778, in which the Scottish courts appeared to (implicitly) recognise the status of enslaved individuals as such: see Cairns, above n 15, p 75.

[18]Cf *Miller*, above n 2, para 8.

[19]This is in line with the observation of Professor Allain that 'as a result of its [slavery's] legal abolition, so the thinking went, slavery no longer existed': see J Allain 'Identifying a case of slavery' in K Bales (ed) *Antislavery Usable Past Reader* (forthcoming) ch 11.

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conferring the status of 'person' upon an entity has, as a matter of law, and assesses the extent to which there can be said to be a legal binary between 'persons' and 'things' in 'living Roman legal systems', such as Scotland.[20] Drawing on this discussion, the piece then considers the historical place of slavery in Scots law and investigates, with reference to the Acts of the pre-1707 Scottish Parliament providing for the astriction of colliers, coal-bearers and salters to the mines,[21] the extent to which the concept of slavery, as it would be recognised in domestic Scots and in international law, can be said to be necessarily bound up in notions of ownership. In concluding that, at present, the definition in European human rights law is necessarily so bound, the paper closes by recommending that domestic Scots law draw on a wider definition of 'slavery' than that present in ECHR jurisprudence in order to capture the nature of the wrong that the Scottish Parliament sought to prohibit.

1. 'Persons', 'servitude' and 'slavery' in s 4

Before embarking on a discussion of historical legal perspectives on 'slavery' and 'servitude' it is necessary to establish what, precisely, Parliament has proscribed in passing s 4 of the 2015 Act. For that reason, subsection (1) of the Act is set out below:

> (1) A person commits an offence if—
> (a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is so held, or
> (b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform such labour.

As Lady Stacey indicated at first instance in *Miller*,[22] per subsection (2), when defining 'slavery' or 'servitude', one must have reference to the jurisprudence of Article 4 of the ECHR,[23] which consequently here means that 'slavery' must be interpreted in light of the 1926 Convention on Slavery per the decision in *Siliadin v France*.[24] In respect of 'servitude', the prosecution must prove that there has been a 'particularly serious form of denial of freedom'[25] which includes 'in addition to the obligation to perform certain services for others … the obligation for the "serf" to live on another person's property and the impossibility of altering his condition'.[26] As such, any prosecutor must demonstrate either that the accused held the victim as a slave within the '"classic"[27] meaning of [that term] slavery as it was practised for centuries',[28] or that they held the victim in servitude within the aforementioned terms.

Section 4 of the 2015 Act mirrors s 1 of the Modern Slavery Act 2015, which applies to England and Wales.[29] The courts of England and Wales are bound, then, like those of Scotland, to interpret 'slavery' or 'servitude' in the manner prescribed by *Siliadin*.[30] Unlike in Scots law, however,

[20]See E Descheemaeker and H Scott *Iniuria and the Common Law* (Oxford: Hart Publishing, 2013) p 2. See also JW Cairns and P Du Plessis 'Ten years of Roman law in the Scottish courts' 2008 SLT 191 and D Walker *The Scottish Legal System: An Introduction to the Study of Scots Law* (Edinburgh: W Green, 8th edn, 2001) p 41.

[21]See the Act Anent Coalyers and Salters 1606 APS iv 286, c 10.

[22]*Miller*, above n 2, para 8.

[23]As the 'Human Rights Convention' is so defined in s 4(6).

[24]*Siliadin*, above n 5, para 122.

[25]*Van Droogenbroeck v Belgium* 7906/77 [1982] ECHR 3 para 58.

[26]*Siliadin*, above n 5, para 123.

[27]That is to say, the Roman: see A Watson *Slave Law in the Americas* (University of Georgia Press, 1989) p 129. As Watson notes, in the period of European colonialism, 'Roman law [was] the model', thus in the European colonies 'a modified non-racist slave law was imposed on a racist slave society'.

[28]See *Siliadin*, above n 5, para 122.

[29]Modern Slavery Act 2015, s 60(1).

[30]Ibid, s 1(2).

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'ownership' is not traditionally recognised as a legal concept in the common law world.[31] Common law courts consequently have a certain degree of latitude in interpreting the term 'ownership', in defining slavery, which is not available to the Scottish courts.[32] In Scotland, property law remains 'resolutely Civilian in character' and 'ownership' or *dominium* exists as a defined legal concept.[33] Thus, on the face of it, the Scottish courts cannot convict a 'person' of holding another in 'slavery', as *Miller* demonstrates, since in Scots law no person may hold another in their patrimony.

Indeed, in the Scottish context, the 2015 Act's use of the term 'person' to refer to both perpetrator and victim is also notable. As Professor MacCormick discussed in his *Institutions of Law*, 'being a person is additional to being a human being',[34] although by dint of Article 6 of the Universal Declaration of Human Rights every human being has a claim-right to this 'additional recognition'.[35] The 'classic' meaning of 'slavery' evolved before our present 'age of rights'[36] and before international instruments such as the UDHR entreated signatory states to recognise the 'inherent dignity… of all members of the human family'[37] which is shared equally among all, regardless of colour, class or creed.[38] Indeed, one of the primary hallmarks of this brand of slavery, as a legal institution, is the fact that it reifies – and so dehumanises – those whom the system deems to be 'slaves'.[39] Under any legal system which recognises slavery, certain human beings are denied 'personhood' and so denied legal protection, capacity and agency; as non-persons, they cannot be directly wronged in law. This, as demonstrated in the course of this paper, has an obvious knock-on effect on the criminalisation of 'slavery' within the terms of s 4.

Since the 2015 Act must be interpreted in light of both the 'classic' meaning of slavery as set out in *Siliadin* and the peculiarly legal, rather than the now-everyday, meaning of the term 'person', in order for an accused to be convicted of the proscribed offence under subsection (1)(a), it must consequently be syllogistically[40] established in any case that (1) the accused (the 'master') (P_1) is a person (P_*); (2) the complainer (the 'slave' or 'serf') (P_2) is a person (P_*);[41] (3) that P_1 knowingly (or should have known that P_1) held P_2 in slavery or servitude. In order to establish (3), it must either be shown (I) that P_1 exercised genuine rights of ownership over P_2 (this necessitates there being extant some legal framework which permits ownership of human beings) or that (II) P_1 denied P_2 their freedom, required P_2 to carry out services for P_1's benefit, forced P_2 to live on P_1's land and afforded P_2 no opportunity to change their status. As is apparent from the decision in the *Miller* case, it is possible for one to demonstrate (II) in modern Scots law, however establishing (I) is seemingly impossible, as in Scots law P_1 can never be shown to have exercised a genuine legal right of ownership over P_2. Indeed, as the historical investigation in this paper establishes, it appears that the prohibition of slavery in s 4 (1)(a) would be legally meaningless in any Western legal system which employs the '"classic" meaning of slavery as it was practised for centuries',[42] since slaves were not ascribed juridical 'personhood' and so could not be designated P_* for the purposes of any charge under this legislation.

[31]See JE Penner 'The concept of property and the concept of slavery' in J Allain (ed) *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford: Oxford University Press, 2012) p 242.

[32]The English courts may be able to adopt a purposive approach to interpreting s 1 of the Modern Slavery Act 2015; as indicated by the judgment in *Miller*, this option is not available to the Scottish courts as there must, by the construction of the statute, be evidence of *legal* ownership of a 'person' for 'slavery' to be established: *Miller*, above n 2, para 9.

[33]DL Carey-Miller et al 'National report on the transfer of movables in Scotland' in W Faber and B Lurger (eds) *National Reports on the Transfer of Movables in Europe Volume 2: England and Wales, Ireland, Scotland, Cyprus* (Sellier, 2009) p 311.

[34]See N MacCormick *Institutions of Law: An Essay in Legal Theory* (Oxford: Oxford University Press, 2007) p 77.

[35]MacCormick, above n 34, p 77.

[36]F Du Bois 'Private law in the age of rights' in EC Reid and D Visser *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (Edinburgh: Edinburgh University Press, 2013) p 12.

[37]Universal Declaration of Human Rights, Preamble; Art 1.

[38]Ibid, Art 2.

[39]MacCormick, above n 34, p 85.

[40]See N MacCormick *Rhetoric and the Rule of Law* (Oxford: Oxford University Press, 2005) p 147.

[41]It must be emphasised that the fact of the humanity of either P_1 or P_2 is not conclusive evidence that either are 'persons' in law.

[42]See *Siliadin*, above n 5, para 122.

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The 'classic' meaning of slavery is rooted in Roman law.[43] Roman law, as noted above, forms the basis of the modern Scots law of property (as well as the property law of all other Civilian and Mixed jurisdictions),[44] but in many European jurisdictions (including France and Scotland) in which slavery was not recognised in domestic common law, Roman slave law was not received.[45] Nevertheless, Roman law, as it pertained to slaves and slave-ownership, was used to fill the 'gaps in the law relating to slaves' in the European colonies, and Anglo-American judges adopted this method as readily as did those trained in the Civil law tradition proper.[46] As Phillips observed, 'the Romans left slavery as a major legacy, whose distant legatees were the slaves and slave-owners of the Americas'.[47] The Roman conceptualisation of 'slavery' as an institution which reifies and dehumanises the 'slave', consigning them to the status of 'res' (thing), thus evidently influenced the drafters of the 1926 Slavery Convention,[48] which now provides the definition of 'slavery' within ECHR jurisprudence and, consequently, modern Scots law. Accordingly, it follows that the 'classic' position of slavery merits some consideration, since to appropriately understand the interpretation of 'slavery' in twenty-first century Scotland (or, indeed, elsewhere), the key concepts at play remain rooted in Roman law.

2. Legal persons, legal property

(a) Legal persons and legal property in Roman law

The Emperor Justinian (and his juristic predecessor, Gaius) divided Roman law under three headings: the law of persons; the law of things; and the law of actions.[49] According to this schema – prima facie – all human beings were quintessentially corporeal *res humani iuris*[50] ('things' subject to human, as opposed to divine, law)[51] and so could be 'owned' by others.[52] In order for a human being to escape designation as a mere *res*, or 'thing', wholly subject to the despotic control of another,[53] said human being would require juridical recognition of their *libertas* (liberty) and *caput* (civil status, or 'personhood') within the terms of the *ius quod ad personas pertinet* (the law pertaining to persons).[54]

From the outset of the title *de Iure Personarum* ('the law of persons'), Justinian observes that 'the primary division in the law of persons is between those human beings that are free and those that are slaves'.[55] Read within the wider context of the *Corpus Iuris Civile*, however, it is plain that 'a slave was

[43]WD Phillips Jr *Slavery from Roman Times to the Early Transatlantic Trade* (University of Minnesota Press, 1985) p 16.

[44]As Professor Reid observed on review of VV Palmer's (ed) *Mixed Jurisdictions Worldwide* (Cambridge: Cambridge University Press, 2012), 'the law of property in mixed legal systems is always Civilian': see KGC Reid 'Patrimony not equity: the trust in Scotland' in R Valsan *Trust and Patrimonies* (Edinburgh: Edinburgh University Press, 2015) p 111.

[45]See Watson, above n 27, p 126; G MacKenzie *The Institutions of the Law of Scotland* (Edinburgh: John Reid, 1684) p 73.

[46]Watson, above n 27, p 129.

[47]Phillips, above n 43, p 16.

[48]With its reliance on demonstrating the 'master's' exercise of 'rights of ownership' over the slave, the Convention clearly conceptualises 'slavery' in line with the Roman institution in which the slave is conceptualised as an object which is treated no differently from any other piece of property in the owner's patrimony.

[49]Gai *Institutiones* I, 8; Justinian *Institutiones* I, Title II, para 12; per MacCormick 'even in the twenty-first century, one can still say rather as Gaius did twenty centuries ago, that all law concerns persons, things and actions': MacCormick, above n 34, p 77.

[50]Gaius *Institutes* 2, 8; Justinian *Institutes* 2, 2, 12.

[51]See the discussion in J Brown *Res Religiosae and the Roman Roots of the Crime of Violation of Sepulchres.*

[52]Gaius *Institutes* 2, 9. As Watson emphasises, by the time of the *lex Aquilia*, 'the killing of, and injuries to, slaves are classed along with the killing of, and injuries to, herd animals': A Watson *Roman Slave Law* (Baltimore: JHUP, 1987) p 46.

[53]See the discussion in S Weil *La Personne et le Sacré*, translated as *Human Personality* by R Rees in *Selected Essays 1934–1943* (Oxford: Oxford University Press, 1962) p 62.

[54]As Esposito notes, 'persons are defined primarily by the fact that they are not things, and things by the fact that they are not persons': R Esposito *Persons and Things* (Cambridge: Polity Press, 2015) p 16.

[55]'*Summa itaque divisio de iure personarum haec est quod omnes homines aut liberi sunt aut servi*': Justinian *Institutes* Book I, Title 3, para 1; this sentiment is mirrored in Gaius' *Institutes*: '*et quidem summa divisio de iure personarum haec est quod omnes homines aut liberi sunt aut servi*': Gai *Institutiones* Book I Title III, §9.

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not a "person" at all'.[56] Though a human being, a slave had neither *libertas* nor *caput*[57] and was governed by the same rules that applied to domestic animals.[58] In this light, it seems that Roman slaves lacked even the 'pure passive capacity'[59] (ie 'the condition of being eligible to receive the protection of law for one's own sake') that is the 'minimum legal recognition that can be conferred on any being'.[60] Though there were several Imperial rulings which were designed to afford protection to slaves, these were 'concerned with the specific issue of slaves as property' and so can be said to be comparable in scope and design to modern animal welfare legislation[61] (where such falls short of ascribing 'personhood' to animals).[62] As Moyle observes, 'so far as there is any difference of treatment [between slaves and animals in law] it is due to the slave's possession of reason, so that (a) he is able to increase his master's means by his intellectual as well as by his physical powers, and (b) by manumission he is capable of becoming a "person"'.[63]

The latter point is significant; unlike in a system of slavery which is wholly predicated on racism, in Roman law 'enslavement could happen to anyone; even to a Roman citizen. Being a slave was no indication of moral or intellectual inferiority'.[64] This contradistinction between the Roman institution of slavery and the race-based system of slavery which arose in the later European colonies does not imply that the lot of the Roman slave was in any way better than his counterpart in (say) eighteenth century Jamaica.[65] Neither he nor his African (or African-descended)[66] compatriot were 'persons' within the eyes of the law (of their respective societies) and both were regarded as 'property' *de jure*. The distinction between racial and non-racial slavery lay only in the fact that the lot of a Roman slave who was subsequently freed was generally[67] better than a manumitted black slave in any system based on racial segregation,[68] since the former might attain the 'coveted' status of citizenship,[69] while the latter would

[56]See JB Moyle *Imperatoris Iustiniani Institutiones Libri Quattuor: With Introductions, Commentary and Excursus* (Oxford: Clarendon Press, 3rd edn, 1896) p 111.

[57]G Long 'Caput' in W Smith *A Dictionary of Greek and Roman Antiquities* (London: John Murray, 1875) p 239.

[58]See the discussion in A Watson 'Rights of slaves and other owned-animals' (1997) Animal Law 1 at 1–6.

[59]MacCormick, above n 34, p 86.

[60]MacCormick, above n 34, p 94.

[61]Watson, above n 58, at 4.

[62]On this point see LR Danil, 'Legal personhood for non-human animals? The case of the non-human rights project' (26 April 2018, UK Human Rights Blog), available at ukhumanrightsblog.com/2018/04/26/legal-personhood-for-non-human-animals-the-case-of-the-non-human-rights-project-dr-linda-roland-danil/.

[63]Moyle, above n 56, pp 111–112. Even Westrup, who takes pains to emphasise the perceived personhood of slaves in the earliest days of Rome, concedes that the slave in later Roman law merely 'bore the germ of an individual personality (*persona*)' due to the possibility of manumission: see CW Westrup *Some Notes on the Roman Slave in Early Times* (Copenhagen: Ejnar Munksgaard, 1956) p 12.

[64]For a discussion of such, see Watson, above n 58, at 1–5.

[65]Naturally, one must here bear in mind Westermann's remark that 'the best criterion for determining the rigidity and the harshness of any slave system is to be found in the case and availability of its manumission procedures': see WL Westermann *The Slave Systems of Greek and Roman Antiquity* (Philadelphia: American Philosophical Society, 1955) p 25.

[66]Within the context of British colonial slavery, it should be noted that slaves were drawn from other holdings including (inter alia) India, Pakistan and Bangladesh: provided that one was not white, one might find oneself 'owned' as a slave.

[67]Though not exclusively: though 'manumission gave, in general, the coveted Roman citizenship', 'slaves who had been put in bonds, branded by their owner or tortured by the state for a crime and found guilty of it would not, if subsequently freed, become citizens, but have the lowly status of *peregrini dediticii* (surrendered enemies)': Watson, above n 58, at 2–3.

[68]As Finely observed, though early modern advocates of slavery did find recourse to Roman law in providing intellectual justification for their position, and indeed they 'adopted [the Roman framework] almost *in toto*', the racist colonial institution of slavery nevertheless came to diverge significantly from the position found in Roman law, as the law of manumission was (gradually) modified to become as minimal and as restricted as possible: MI Finely *Ancient Slavery and Modern Ideology* (London: Chatto and Windus, 1980) pp 18–19.

[69]Indeed, it has been noted that 'Roman law gave the private citizen, owner of a slave, greater power than that given to the supreme Roman magistrate, who, in order to naturalise a foreigner, needed the conformation of the city's assemblies or an authorisation by the Senate', since any slave-owner could confer Roman citizenship upon his slaves by mere act of manumission: see L Capogrossi Colognesi 'Peregrini and slaves in the Roman empire' (1996) Fundamina 236 at 244.

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not attain[70] (and indeed it may be said that their descendants have not yet won) full civil rights in the eyes of the law.[71]

The term '*persona*' was not therefore, in Roman law, synonymous with '*homo*', just as the word 'person' is not identical to the term 'human being' in historical, nor indeed modern, Scots law. While the scope of the word 'person' has now been extended to encompass incorporeal entities such as companies and business partnerships,[72] and in some jurisdictions the legal status of 'person' has been conferred upon natural resources and landmarks,[73] in Roman law the term *persona* was much narrower in scope.[74] It was not, as Professor Nicholas suggested in his *Introduction to Roman Law*,[75] a word with no technical meaning, denoting only 'as "person" does in ordinary speech today, a human being, whether capable of holding rights and duties or not'.[76] Instead, as Professor Waelkens observed 'in legal texts the word was used for the actors in a law suit. When the word occurs in the *Corpus Iuris Civile*, it has thus to be understood as referring to one of the men present in court'.[77]

Rather than finding use as a device to extend the benefits of 'personhood' to entities other than human beings, the status of *persona* was, consequently, fundamentally exclusive. In addition to being restricted in scope only to 'natural' legal persons,[78] the designation of 'persons' also served as a primarily procedural status which distinguished those who held full entitlements under the civil law from those who did not.[79] As Professor Esposito noted in his text on *Persons and Things*, this was explicitly by design:[80] 'the more human beings that an individual manages to place on the sloping plane of the thing, the more solidly he or she acquires the title of person'.[81] Thus, not only were slaves excluded from the horizon of personhood, but women and children were likewise[82] (though they could be afforded the status of *persona* if they were represented by a tutor in court).[83] Generally, in Roman law, those who remained *in alieni iuris* (in the power of another – ie within the *patria potestas* of a

[70]See the infamous decision in *Dred Scott v Sandford* 1857 US Supreme Court.

[71]See Note 'The meaning(s) of "the people" in the constitution' (2013) Harvard Law Review 1078 at 1091.

[72]Care should be taken to avoid categorising such extension of 'personhood' to incorporeal entities as a legal 'fiction', as MacCormick cautions: see MacCormick, above n 34, p 84.

[73]See the discussion in EL O'Donnell and J Talbot-Jones 'Creating legal rights for rivers: lessons from Australia, New Zealand, and India' (2018) Ecology and Society 7.

[74]Per Horsman and Korsten, the term *persona* 'distinguish[ed] holders of full civil rights from those who lacked such civil personhood': see Y Horsman and F-W Korsten 'Introduction: legal bodies: corpus/ persona/ communitas' (2016) Law and Literature 277 at 277.

[75]B Nicholas *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962).

[76]Nicholas, above n 75, p 60.

[77]LLJM Waelkens 'Medieval family and marriage laws: from actions of status to legal doctrine' in JW Cairns and PJ du Plessis *The Creation of the Ius Commune: From Casus to Regula* (Edinburgh: Edinburgh University Press, 2010) p 104.

[78]Nicholas, above n 75, p 61.

[79]See Horsman and Korsten, above n 74, at 277.

[80]Though in turn, by design, the Roman Emperors began, at the beginning of the third century, a process of extending the scope and reach of the *ius civile* to bring as many human beings as possible under its umbrella: see RW Mathisen 'Peregrini, barbari, and cives romani: concepts of citizenship and the legal identity of barbarians in the later Roman empire' (2006) American Historical Review 1011 at 1013.

[81]See Esposito, above n 54, p 27; note, also, Tay's remarks that 'property is that which a man has a right to use and enjoy without interference; it is what makes him a person': A Tay 'Law, the citizen and the state' in E Kamenka et al (eds) *Law and Society: The Crisis in Legal Ideals* (London: Edward Arnold, 1978) p 10. While Esposito consciously avoids the use of gendered language, Tay self-consciously employs it in explicit recognition of the differential of power enjoyed by men in claims of 'personhood'.

[82]It should, however, be recognised that some women – those *sui iuris* – were recognised as *paterfamilias* in their own right and so would possess 'personhood' within the meaning discussed in this paper. This 'personhood' was always more limited than that afforded to men, however, since the designation of *paterfamilias* could only ever be applied to women in a reduced sense: women were not permitted to hold *patria potestas* – paternal power over life and death – over their children, as men could: see RP Saller 'Pater familias, mater familias, and the gendered semantics of the Roman household' (1999) Classical Philology 182; Gaius *Institutes* Book II, para 104.

[83]See the discussion in Waelkens, above n 77, pp 104–105.

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paterfamilias) were not 'persons', though they might have the potential to be recognised as such in certain circumstances.[84] Slaves and *peregrini* (foreigners) had no entitlements under the *ius civile* and so were likewise not *personae*;[85] they did not escape the designation of *res* ascribed to them under the *ius quod ad res pertinet* (the law pertaining to things) of the *ius civile*.[86]

Esposito's observation, and the state of Roman law as described above, correlates with the observations of Adam Smith that though 'the work done by freemen comes cheaper in the end than that done by slaves',[87] humankind 'will generally prefer the services of slaves to that of freemen'[88] given that 'the pride of man makes him love to domineer, and nothing mortifies him so much as to be obliged to condescend to persuade his inferiors'.[89] For as long as man regards women, children, foreigners and his servants as his 'inferiors', then he is likely to actively seek to diminish the 'personhood' of those whom he perceives as beneath him. Such tendencies will, naturally, be exaggerated in any cultural milieu which finds slavery morally unobjectionable.

As an *instrumentum vocale* – a 'speaking tool' – it is obvious that the slave could be said to 'hover', in part, between 'the regime of persons and things', in much the same way that 'wives, sons and insolvent debtors' did so.[90] From the above discussion, however, it is likewise plain that as a matter of Roman law, all human beings were – first and foremost – 'things', with some such 'things' being distinguished from the others primarily by dint of their possession of the status of 'person'.[91] To be a 'person', in Roman law, was therefore to hold some significant status. This significant status was afforded to those who were *sui iuris* or *paterfamilias* and thus entitled to appear in the law courts. Foreigners were denied this status, though they did have the protection of the *ius gentium* and their own 'personal' law,[92] but slaves – who were also and always denied 'personhood' – were mere things subject to be used and abused by their owners however that owner saw fit. Though it is certainly true and notable that several laws were passed, in Roman times, aimed at improving the lot of slaves, it is equally plain that such juridical acts fell far short of affording legal recognition to the personhood – or even the humanity – of those enslaved. As Watson stated in a 1997 work, 'in restraining cruelty no mention is made of the slave's well-being'.[93] It is, rather, said only to be 'in the interest of the state that no one should abuse his property'.[94]

[84]There was, however, a distinction to be drawn between the place of those under the *potestas* of a *pater* and the slave within the *familia* in Roman law. The *pater* enjoyed *dominium* – a relationship of ownership conferring powers of use, abuse and entitlements to the 'fruits' (benefits generated by labour) – over the slave, since the slave belonged fully to the province of the *ius quod ad res pertinet*. By contrast, the family member held *in potestas* was subject to the *ius quod ad personas pertinet*: see Gai *Institutiones* Book I, Tit 8–9; though this *potestas* gives the power many of the marks of 'property' as it might be conceptualised in modern terms, it is evident that *patria potestas* is fundamentally distinct from the concept of proprietary 'rights': see Westrup, above n 63, p 8.

[85]Westrup, above n 84, p 15.

[86]*Peregrini* were, however, afforded 'rights' under the *ius gentium*, rather than the *ius civile*, but, as the discussion above makes clear, slaves could lay claim to (almost) no entitlements. As Professor van den Berg observed recently, the Romans did not regard slavery as a morally objectionable institution and so, 'they did not feel the need to grant legal capacity to [slaves]… according to Roman law, slaves were just *res*': PAJ van den Berg 'Slaves: persons or property? The roman law on slavery and its reception in western Europe and its overseas territories' (2016) Osaka University Law Review 171 at 187.

[87]A Smith *An Inquiry into the Nature and Cases of the Wealth of Nations* vol I, viii 41.

[88]Smith, above n 87, vol I, viii 41.

[89]Smith, above n 87, vol I, viii 41.

[90]See Esposito, above n 54, p 26.

[91]Indeed, as Buckland notes, a slave who was abandoned by their master would not become free, but rather become *res nullius* – a thing owned by no one – who would consequently come to be owned by the first *personas* to take possession of the abandoned slave: see WW Buckland *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian* (Cambridge: Cambridge University Press, 1908) p 2.

[92]See SL Guterman 'The principle of the personality of law in the early middle ages: a chapter in the evolution of western legal institutions and ideas' (1966) University of Miami Law Review 259 at 261.

[93]Watson, above n 58, at 4.

[94]Justinian *Institutes* I, Title 8, para 1.

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From the above discussion, it may consequently be inferred that the prohibition of slavery in the 2015 Act would have been nugatory in the Roman legal system, as well as in modern Scots law (as is hypothesised, and shall be discussed further, in this paper). If the term 'slavery' within the context of s 4 is indeed to be understood as proscribing the holding of another as a slave within a *legal* framework of property law, then it might be inferred that the wording of the legislation as it stands cannot possibly criminalise the conduct of any private 'person' within a Romanistic legal system. At present, s 4 proclaims that 'a person commits an offence if (a) the person holds another person in slavery'. From the above discussion, however, it is plain that no 'person' can be lawfully held in slavery, since it is the absence of juridical 'personhood', on the part of the slave, which allows the law to recognise the legal relationship of 'ownership' between that slave and their 'owner'.[95]

It would be impossible, then, to convict one who 'owned' a slave, in the Roman sense, of the offence of holding another person as a slave under s 4 of the 2015 Act. Indeed, unlike in *Miller*, it would likewise be impossible to convict the slave-holder of the offence of holding another 'person' in servitude since, in law, the slave-owner has done no such thing. The slave-owner owns a *res* – a piece of property.[96] The slave-owner does not own a 'person', nor do they hold a 'person' in servitude. Rather than standing in any position akin to that of a modern employer (or 'master', as employers were historically styled)[97] when enjoying the benefit of the slave's labour, the slave-owner simply acts as a property owner enjoying *ius fruendi*: since the slave is a thing, the results of that slave's labour are juridically the fruits of a thing. No 'person' is, therefore, held in servitude under such circumstances: within terms of the analysis above, our Roman P_1 is P_*, but in this instance the enslaved P_2 is demonstrably not.

It goes (or should go) without saying that the dehumanisation and depersonalisation involved in the lawful institution of slavery is utterly immoral. The above discussion is liable to affront all modern moral sensibilities and the very discussion of slavery as a 'legal' institution has provoked disgust from some legal commentators. With that said, however, the historical position in respect of slavery and servitude must be discussed if the words 'slavery' and 'servitude' are to be ascribed any real meaning in modern legislation, particularly since the 2015 Act – by drawing on the ECHR – is bound up with the 'classical' definition of 'slavery'. Thus, given the influence that Roman slave law exercised on both the common law and Continental European legal traditions, the above discussion is warranted.[98] Likewise, consideration of the artificial distinction between slaves as 'things' and freemen as 'persons' is also warranted within the particular Scottish context, as it is this arbitrary divide that allowed the Court of Session to declare, in 1687, that 'we have no slaves in Scotland',[99] in spite of the provisions of the Act Anent Coalyers and Salters 1606 (the 1606 Act),[100] which was not repealed until 1775.[101]

[95]Though compare the discussion above to Thomas Wood's 1704 *New Institutes of the Civil Law*: T Wood *A New Institute of the Imperial or Civil Law* (London: Richard Sare, 1704) p 30, wherein this English jurist notably describes slaves as 'persons'.

[96]'[The slave] always remained for the Roman, firmly and realistically, corporeal property whose value could be measured in monetary terms': Watson, above n 52, p 46.

[97]See S Deakin 'The contract of employment: a study in legal evolution' (2001) Historical Studies in Industrial Relations 32; S Middlemiss and M Downie *Employment Law in Scotland* (Haywards Heath: Bloomsbury, 2nd edn, 2015) para 1.3.

[98]Indeed, in the words of Professor Cairns, 'From the start of sophisticated legal discussion of slavery in Scotland, Roman concepts were in use to understand the phenomenon, and slaves were understood to be property': see JW Cairns 'The definition of slavery in 18th century thinking: not the true Roman slavery' in Allain, above n 31, p 72.

[99]*Reid v Scot of Hardin and His Lady* (1687) Mor 9505.

[100]APS iv 286, c 10.

[101]See the Colliers and Salters (Scotland) Act 1775 15 Geo III c 28, although it should be noted that it took a second Act – the 1799 Act of Parliament to Explain and Amend the Laws Relative to Colliers in Scotland – to finally 'free' the colliers from 'servitude': see the discussion in J Erskine *The Principles of the Law of Scotland: In the Order of Sir G. Mackenzie's Institutions* (Edinburgh: Bell and Bradfute, 12th edn, 1827) p 117.

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(b) Scots law, slavery and serfdom

Viscount Stair affords considerable attention to the subject of liberty, servitude and slavery in his *opus*, the *Institutions of the Law of Scotland*.[102] In the second title of the text, in line with the Romanistic position outlined above, Stair states that 'bondage exeemeth man from the account of persons, and brings him rather in among things, *quae sunt in patrimonio nostro* [ie things which might be held by another in private patrimony]'.[103] Affront to one's liberty, he says, 'are the most bitter and atrocious' forms of injury, though the right to liberty is not to be taken as an absolute.[104] One's liberty might be lawfully constrained for a number of reasons: as a result of obediential obligation;[105] as a result of penal punishment or civil incarceration for non-payment of debt;[106] and by the dictate of the sovereign.[107] In addition to this, Stair recognises that 'liberty is wholly taken away by bondage, slavery or servitude, which is diametrically opposed to liberty; for as liberty is that power, by which men are *sui iuris*, so by servitude they become *alieni iuris*'.[108] In Stair's schema therefore, in spite of the high level of importance ascribed to individual liberty, 'bondage, though contrary to the nature of liberty… is lawful, liberty being a right alienable, and in our disposal'.[109]

In common with the Romans,[110] Stair locates the law of slavery within the *ius gentium*,[111] rather than the *ius naturale*, noting that 'bondage was introduced by the law of nations, and it is amongst the positive laws of nations settled by common consuetude'.[112] The 'leniency' and 'mercy' of the Christian religion had, according to Stair,[113] by his time effected the abrogation of slavery in almost all European nations (save Spain, Portugal and those nations bordering the Ottoman Empire, who 'may have slaves to exchange with slaves'),[114] yet it was nevertheless recognised that *adscriptitii* (ie 'serfs')[115] – 'who are not absolutely slaves',[116] though nevertheless in servitude[117] – subsisted in England (as villainage),[118]

[102]Unless otherwise noted, reference to Stair in this paper is reference to the second edition reprint edited by David M Walker. The second edition of Stair's text is said to be 'on the whole, the best' by John S More, editor of the fifth edition, and indeed it is on this edition that the four subsequent editions of the work have been based (though not, as Professor Walker notes, without, in the cases of the third, fourth and fifth editions, the editors having 'at many points taken liberties, frequently very great liberties, with Stair's text): see DM Walker (ed) *Stair: The Institutions of the Law of Scotland* (Glasgow: Glasgow University Press, 1981) p 47.

[103]Stair *Institute* 1, 2, 2.

[104]Stair *Institute* 1, 2, 2–5.

[105]Stair gives the following example (inter alia): 'a husband hath power to restrain his wife from her liberty of going where she will, and may keep her within the bounds of conjugal society': Stair *Institute* 1, 2, 5.

[106]Stair *Institute* 1, 2, 6–7.

[107]Stair *Institute* 1, 2, 8.

[108]Stair *Institute* 1, 2, 9.

[109]Stair *Institute* 1, 2, 11.

[110]See the discussion in B Tierney *The Idea of Natural Rights* (Cambridge: Eerdman's, 1997) p 136.

[111]Dig 1.1.4.

[112]Stair *Institute* 1, 2, 10; this follows from *Regiam Majestatem*, in which it is recognised that manumission is a product of the *ius gentium* also: see *Regiam Majestatem* I, Cap 14.

[113]Though for a critical consideration of this assertion see J Millar *The Origin of the Distinction of Ranks* (Aaron Garrett ed) (Indianapolis: Liberty Fund, 2006) pp 264–267.

[114]Stair *Institute* 1, 2, 11.

[115]Cf T Smith *De Republica Anglorum; A Discourse on the Commonwealth of England* (Cambridge: Cambridge University Press, 1906) p 130: '[The *adscripti*] were not bound to the person but to the manor or place, and did follow him who had the mannors, and in our law are called villains regardants'.

[116]Stair *Institute* 1, 2, 11; though Ballentine's Law Dictionary of 1916 does simply – without further comment – define *adscriptitii* as 'slaves' – see JA Ballentine *A Law Dictionary* (Indianapolis: Bobbs-Merrill Co, 1916) p 10.

[117]Such was the similarity in factual circumstance between the Roman slave and the feudal serf that 'Bracton thought himself entitled to assume equality of condition between the English villain and the Roman slave': P Vinogradoff *Villainage in England: Essays in English Mediaeval History* (Oxford: Clarendon Press, 1892) p 47, though it has been suggested that one should not readily assume that the mediaeval word '*servus*' was wholly analogous to the word in classical Latin: van den Berg, above n 86, at 177.

[118]Of which, see Vinogradoff, above n 117.

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'but in Scotland there is no such thing'.[119] *Adscriptitii*, unlike those bound in vassalage or 'free' labourers and artisans, were (in Stair's conceptualisation) essentially serfs bound to the land on which they laboured;[120] they could not leave the land nor could they be sold by their 'masters', as they were 'fixed to and follow' the land 'and they are conveyed therewith'.[121] According to Professor Millar, writing almost a century after Stair,[122] in Scotland villainage had fallen into disuse by the late seventeenth century 'without any aid of statute',[123] though even by Millar's time 'the period when this change was effected [had] not been ascertained by lawyers or historians'.[124]

Even while the institution of serfdom was recognised, however, and Scottish *adscriptitii*, villains or serfs were recognised as being in bondage and so not fully 'persons', they were not 'absolutely' slaves.[125] From this, it consequently follows that they cannot be deemed to have been *only* 'things', as Roman slaves were.[126] Rather, it seems that the Scottish serf – prior to the abrogation of the concept of serfdom – must be thought to have lain in an intermediate field between the law of 'persons' and the law of 'things'. While, in some sense, they may have been viewed as closer to 'things' than to 'persons' in the eyes of the law, it nevertheless remains the case that it cannot be said that there existed a clear binary between 'persons' and 'things' in early Scots law. The slave was 'absolutely' a thing; the freeman 'absolutely' a person. The bondman was something in between; sometimes person, sometimes thing, sometimes both. In effect, their legal position was comparable to that of a slave in the *familia* under early Roman law;[127] indeed, when speaking of bondmen, *Regiam Majestatem* never once utilises the word '*dominium*' to describe the relationship between bondman and master, but instead, like the earliest Roman sources, uses the term '*potestas*',[128] denoting 'power' rather than 'ownership'.

After the systemising efforts of jurists such as Craig, MacKenzie and Stair himself (though Stair was notably critical of the Romanistic schema), the Roman tripartite division of law into 'persons', 'things' and 'actions' was received into early modern Scots law.[129] It is thus at this juncture – after the institution of agrarian serfdom had vanished from Scotland[130] – that a perceived persons/property binary might be said to have first emerged in Scotland, however as with the later divide between 'property law'

[119]Stair *Institute* 1, 2, 11; the wording of this part is identical in the first edition of (1681) (printed by the heir of Andrew Anderson) and the second edition of 1693 (also originally printed by the heir of Andrew Anderson). In Erskine's *Principles* (Rankine ed), however, colliers, salters and coal-bearer are likened to the *adscriptitii*: see J Rankine (ed) *Erskine's Principles of the Law of Scotland* (Edinburgh: W Green, 21st edn, 1911) p 105.

[120]For 'serfdom' as it subsisted in early Scots law, see *Regiam Majestatem* I, Cap 11–14.

[121]Stair *Institute* 1, 2, 15

[122]Millar's work, *The Origin of the Distinction of Ranks*, was first published in 1771. The text went through three editions in the author's lifetime: see the discussion in Cairns, above n 15.

[123]Millar, above n 122, p 268.

[124]Millar, above n 122, pp 268–269.

[125]See also Baron F Duckham 'Serfdom in eighteenth century Scotland' (1969) History 178 at 178.

[126]Indeed, though, in Roman law 'all men are either free or slaves – there is no third, intermediate category' (Watson, above n 52, p 7), early Scots law recognised categories in between these binaries. *Regiam Majestatem* notes that though the *ius gentium* recognised three types of human beings: the freemen and their opposites, the slaves, as well as those who were once slaves but have now been freed, a fourth type of human being came to be recognised '*ab ebrietate Noae*' (in the drunkenness of Noah): the bondman. While the tripartite division of human beings is lifted almost wholesale from Ulpian and Justinian's *Institutes* (Dig 1.14; Justinian *Institutes* I, 5) the allusion to bondmen appears to have its root in Gratian's *Decretals* (I, 35, 8) and demonstrates the unique – and non-Roman – classification of bondmen as something other than plain 'persons' or mere 'things': see Lord Cooper of Culross (ed and trans) *Regiam Majestatem and Quoniam Attachiamenta Based on the Text of Sir John Skene* (Edinburgh: Stair Society, 1947) p 118.

[127]See Westrup, above n 63, p 12.

[128]See *Regiam Majestatem* I Cap 14. '*Dominus*' – in the sense of 'Lord' or 'Master' – is used within the chapters of *Regiam Majestatem* pertinent to the subject of bondmen, but nothing therein implies that the Lord or Master exercises 'ownership' of their bondmen; rather, the bondmen are '*manui et potestati sui domini subjectus est*': 'subject to the power and hand of their Lord'.

[129]See the discussion in J Brown 'Jus quaesitum tertio: a res, not a right?' (2019) Jur Rev 53 at 72. Due to the expanding importance of the law of obligations, the Roman tripartite *iurum divisione* has expanded into a quadripartite division, recognised as comprising 'Scots private law' within the Scotland Act 1998, per s 126(4).

[130]See also Duckham, above n 125, at 178.

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(ie 'thing-law') and the law of obligations,[131] this binary cannot be said to be absolute – and, as such, is to be more appropriately understood as a continuum than an absolute separation. Thus, agrarian serfs, while they existed in Scots law, were undoubtedly in servitude, although they were manifestly not 'slaves', since slavery necessarily entails a full denial of the personhood of the slave.

With that said, though emphasising that agrarian serfdom had ceased to subsist in Scotland,[132] Stair nevertheless accepted that Scots law recognised 'a kind of bondage' called 'Manrent',[133] but went on to emphasise that this institution placed the 'free persons' *in clientela* (in vassalage) rather than in bondage, and that in any case it had been abolished by subsequent Parliamentary Acts and custom.[134] Rather than being conceptualised as slaves (and so 'things'), under Scots law 'servants' were adjudged to be free 'persons' who have hired their labour by contract,[135] just as any modern 'contract of service' relationship between employer and employee might be so understood.[136] Against this background (Stair's *Institutions* having first been published in 1681),[137] and combined with Sir George MacKenzie's observation that 'we have little use in Scotland, of what the Institutions of the Roman Law teach, concerning slaverie… for we as Christians allow no Men to be made Slaves',[138] the stage was set for the Court of Session to rule, in 1687, that 'we have no slaves in Scotland'.[139]

Yet, at the time that *Reid* was decided, the aforementioned Act Anent Coalyers and Salters of 1606[140] remained in force throughout Scotland. This legislation provided, inter alia, that no one was to employ a salter, collier or coal-bearer without the approval of the 'Maister whom they last served', that 'vagabonds and sturdie beggers' could be apprehended and put to work in the mines and that any salter, collier or coal-bearer who left the employ of their master were to 'be esteemed, reput and halded as theives [sic], and punished in their bodies'. In effect, then, the legislation provided that colliers, salters and coal-bearers were, in like manner to agrarian serfs, absent liberty, bound to the mines in which they laboured, and thus evidently in the power of the mine-owner or master. This state of servitude could only be altered with the leave of the 'Maister whom they last served', so this astricted status was life-long.

In spite of the statutes ordaining the bondage of colliers and salters, Stair made no mention of the lot of these unfortunate bondmen in either of the editions of his *Institutions* published during his lifetime. Only bondage to farms and villages appears to enter Stair's cognisance;[141] it is only by a later editorial hand that consideration of colliers and salters appears in the *Institutions*. The consideration given in the later editions of Stair's work is consistent with Scottish legal literature of the eighteenth century. In the intervening period between the second and third editions of Stair's work,[142] in 1722,[143]

[131]See the discussion in Brown, above n 129, at 72.

[132]See also Duckham, above n 125, at 178.

[133]Stair *Institute* 1, 2, 12.

[134]Stair *Institute* 1, 2, 11; APS ii 50, c 24 and APS ii 487, c 17.

[135]Stair *Institute* 1, 2, 15.

[136]Middlemiss and Downie appear, therefore, to err when, in their text on *Employment Law in Scotland*, they suggest that in Scots law at this time 'the master not only had a right to the fruits of the labour of his slave, but he became the legal owner, body and soul, of a human being whom the law counted as a chattel': see Middlemiss and Downie, above n 97, para 1.2. The relationship described by Stair appears to fit better within the framework of the 'Victorian' master-servant relationship, rather than any 'master-slave' relationship and, though it is the case 'that on several estates the children of coal workers were considered to be life bound too brings the Scottish experience within the margins of a slave system… the temptation to overstate the argument should be resisted' per C Whatley 'The dark side of the enlightenment: sorting out serfdom' in TM Devine and JR Young *Eighteenth Century Scotland: New Perspectives* (East Linton: Tuckwell Press, 1999) p 262.

[137]The second edition was published in 1693. Various manuscript copies which were later incorporated into the final published editions began circulating from as early as 1664: see GM Hutton 'Purpose and pattern of the institutions' in DM Walker (ed) *Stair Tercentenary Studies* (Edinburgh: The Stair Society, 1981) p 79.

[138]MacKenzie, above n 45, p 73.

[139](1687) Mor 9505.

[140]APS iv 286, c 10.

[141]Stair *Institutes* 1, 2, 11 is unchanged between the first and second edition.

[142]The third edition of Stair's work appeared in 1759; the fourth and fifth editions were each published in the early nineteenth century (1826 and 1832 respectively).

[143]See W Forbes *The Institutes of the Law of Scotland* (Edinburgh: J Watson, 1722).

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the first Regius Professor of law at the University of Glasgow, William Forbes, published the first volume of his own *Institutes of the Law of Scotland*.[144] This work, as Professor MacQueen observed, offers an important insight into the position of Scots law in the period between the appearance of Stair's work and the publication of the later *Institute* of Bankton.[145]

Though Forbes, like Stair, posited that 'we have no vestige of slavery remaining in Scotland',[146] he – unlike Stair – thereafter went on to compare the position of colliers and salters to that of slaves 'at the arbitrary pleasure of [their] masters' who 'may be sold by him as goods'.[147] In setting out the effect of the 1606 Act, Forbes implicitly regarded colliers and salters as 'things', suggesting that should a master lose 'possession' of their labourers, that master might raise an action against 'any unlawful possessor… the possessor must deliver [the collier or salter] back to their Master within twenty four hours' under the pain of a fine.[148] The language of 'possession', naturally, implies 'property'.[149]

Forbes' *Institutions* are, in large part, an abridgement of his unpublished life's work,[150] the *Great Body of the Law of Scotland*.[151] This titanic work, which exceeds a million words and remained unfinished (and thus unpublished) at the time of Forbes' death,[152] though he had worked on it for some 37 years,[153] 'has lain almost unread in Glasgow University Library since 1786'.[154] The work does, however, 'provide the fullest account available of Scots law in the early eighteenth century';[155] as such, it merits consideration here as it provides an elucidation of the law relevant to salters and colliers which is wholly absent from Stair's account of Scots law.

In common with the enlightenment thinkers of the eighteenth century, the title *on Master and Servant* in the *Great Body* begins by positing that 'by the law of nature all men are free born'.[156] Like Stair and the Roman jurists, Forbes repeats the view that 'slavery and bondage were introduced by the law of nations'.[157] In his account, 'servants' are divided into three classes: 'slaves', 'hirelings' and 'apprentices', though only 'slaves are servants in the most proper sense'.[158] It is implied that in Forbes' schema slaves are 'persons', since he uses this term to describe that which might be sold or disposed of by the 'master'.[159] The assertion that 'we have no vestige of slavery remaining in Scotland', present in his *Institutes*,[160] is echoed in the *Great Body*[161] and, indeed, much of the discussion of the lot of colliers and salters mirrors that which is present in the shorter volume.[162]

[144]A work which, at best, exercised a 'rather muted' influence on the development of Scots law: see HL MacQueen 'Introduction' in W Forbes *The Institutes of the Law of Scotland* (Edinburgh: Edinburgh Legal Education Trust, 2012) p vi.

[145]See MacQueen, above n 144, p x.

[146]Forbes *Institutes*, above n 143, p 91.

[147]Forbes *Institutes*, above n 143, p 91.

[148]Forbes *Institutes*, above n 143, p 91.

[149]Though, of course, as Ulpian reminds us, '*nihil commune habet proprietas cum possessione*': Dig 41.2.12.1.

[150]See A Herd 'William Forbes, *The Institutes of the Law of Scotland, with an introduction by Hector L MacQueen*' (2014) Edinburgh Law Review 300 at 301.

[151]W Forbes *A Great Body of the Law of Scotland, containing the harmony thereof, and differences from the civil and feudal laws: and shewing how far the Scots and English law do agree and differ; with incident comparative views of the modern constitutions of other nations in Europe*, (1708–1745). The text is available at www.forbes.gla.ac.uk/contents/.

[152]See JW Cairns 'Scottish law, Scottish lawyers and the status of the Union' in JW Cairns *Law, Lawyers and Humanism: Selected Essays on the History of Scots Law* vol I (Edinburgh: Edinburgh University Press, 2015) p 88.

[153]See JW Cairns 'The origins of the Glasgow law school: the professors of civil law, 1714–1761' in JW Cairns *Enlightenment, Legal Education, and Critique: Selected Essays on the History of Scots Law* vol II (Edinburgh: Edinburgh University Press, 2015) p 148.

[154]MacQueen, above n 144, p vi.

[155]MacQueen, above n 144, p vi.

[156]*Great Body*, above n 151, p 316.

[157]*Great Body*, above n 151, p 317.

[158]*Great Body*, above n 151, p 317.

[159]*Great Body*, above n 151, p 317: 'the master may sell them, dispose of their persons, their industry and their labour'.

[160]Forbes *Institutes*, above n 143, p 91.

[161]*Great Body*, above n 151, p 321.

[162]Compare *Great Body*, above n 151, pp 321–322 and Forbes *Institutes* p 91.

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Of particular note in Forbes' *Great Body* is the author's suggestion that those who are slaves 'in the rigid sense of the Roman law may come claim their freedom as soon as they come into France, Germany, the United Provinces [the Netherlands], England or Scotland'.[163] This assertion must have been made at the very least 26 years before the English case of *Somerset v Stewart*[164] tentatively endorsed this proposition[165] and some 32 years before the case of *Knight v Wedderburn*[166] unequivocally posited that this proposition is true within Scots law.[167] The authority on which this proposition rests is, consequently, of particular interest. Forbes cites the English jurist Thomas Wood's *New Institute of the Civil Law* as authority for his proposition;[168] Wood, for his part, states much the same as Forbes, though he omits mention of Scotland.[169]

Wood's *New Institute* was first published in 1704 and ran to four editions, with the last published in 1730.[170] The third edition, which Forbes appears to have utilised,[171] retains the unequivocal statement that 'slaves may claim their freedom' on arrival in England, Germany and France;[172] the posthumously published fourth edition likewise provides the same statement, with the wording retained, and unaltered, from the first edition.[173] Wood's work has been the subject of little scholarly attention,[174] however, during his lifetime (and for a considerable period thereafter) Wood's '*Institutes* enjoyed considerable popularity in England and in the American colonies'.[175] For that reason, it is perhaps surprising to find no reference to Wood's work in *Somerset v Stewart*, though his second significant work, his *Institute of the Laws of England*, appeared in its tenth edition in that year,[176] having first been published in 1720.[177] Unlike Wood's Civil *Institute*, however, the common law account provides no consideration of the subject of slavery, which perhaps explains why the court of King's Bench felt no impetus to refer to the work, notwithstanding the extensive comparative consideration afforded to the position in other jurisdictions, in the course of that judgment.[178]

In any case, it appears that in both Scotland and in England there existed authority prior to – and post – the Treaty of Union which disavowed slavery as a legal institution.[179] Notwithstanding this jurisprudential hostility towards the juristic institution of slavery throughout the nascent United Kingdom, slavery retained de facto recognition within eighteenth century Scottish society.[180] Indeed, it is evident that 'slaves were a significant presence in eighteenth century Scotland, particularly from the 1740s onwards'.[181] This fact of life stood seemingly at odds with the letter of the law, given

[163] *Great Body*, above n 151, pp 320–321.

[164] (1772) 98 ER 499.

[165] Ibid, para 19.

[166] (1788) Mor 14545.

[167] Ibid, p 14546.

[168] *Great Body*, above n 151, p 322.

[169] Sir Thomas Wood *A New Institute of the Imperial, or Civil, Law* (London: Richard Sare, 1704) p 31.

[170] RB Robinson 'The two institutes of Thomas Wood: a study in eighteenth century legal scholarship' (1991) American Journal of Legal History 432 at 432.

[171] Forbes' reference to Wood directs the reader to p 40 of the work; this citation is not correct for the first edition, but is for the third.

[172] (London: Richard Sare, 3rd edn, 1721) p 40.

[173] (London: J&J Knapton, 4th edn, 1730) p 114.

[174] Robinson, above n 170, at 433.

[175] Robinson, above n 170, at 432.

[176] Sir Thomas Wood *An Institute of the Laws of England* (London: Strahan and Woodfall, 10th edn, 1772).

[177] Robinson, above n 170, at 432.

[178] The court refers to position in Scots law (noting that 'the law of Scotland annuls the contract to serve to life', save in the case of colliers and salters) and in French law (which is described in a manner consistent with the account of Wood and Forbes): *Somerset v Stewart* (1772) 98 ER 499 paras 4–5.

[179] See also *Allan and Mearns v Skene of Skene and Burnet of Monboddo* (1722) Mor 9454, wherein a contract of servitude for 'three nineteen years' was reduced, 'being too great a restraint upon natural liberty'.

[180] TM Devine *Recovering Scotland's Slavery Past* (Edinburgh: Edinburgh University Press, 2015) ch 1, fn 19.

[181] See R Crawford 'Slaves and slaveowners in eighteenth-century Scotland' (2012) Centre for Scottish and Celtic Studies, available at cscs.academicblogs.co.uk/slaves-and-slaveowners-in-eighteenth-century-scotland/.

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the juridical hostility to the concept of 'slavery' expressed by the learned legal writers of the late seventeenth and early eighteenth century.

This juridical hostility continued to be expressed in the Institutional writings published in the latter half of the eighteenth century. Lord Bankton's *Institute of the Laws of Scotland*, which was modelled 'after the general model of Stair's Institutions' and first published in 1751,[182] also expressed doubt on the existence of slavery as in institution in Scots law.[183] Like Forbes' publications, Bankton's work appeared in the interregnum between the publication of the second and third editions of Stair's *opus*. In discussing 'the state and distinction of persons',[184] Bankton unequivocally posits that 'persons are all mankind', though it is accepted that 'the law considers them only with respect to rights, and their different state in that view'.[185] Prima facie, in Bankton's schema, it thus seems that though women, children and vassals might be afforded fewer civil rights than others, such does not imply any difference in the 'personhood' with which they are imbued by dint of their humanity.[186] Such correlates with the eighth edition of Wood's common law *Institute*,[187] which was published very soon after Bankton's work. In any case, Bankton – like his forbearers – is explicit: 'slavery, in a proper sense, does not take place with us'.[188]

Nevertheless, Bankton acknowledges that 'the state of colliers and salters, by our law and custom, resembles, in some respects, that of slaves [in the Roman sense]',[189] however it is stressed thereafter that the lot of colliers and salters is more readily comparable to that of *adscriptitii*.[190] This comparison was also drawn by Erskine, who noted that colliers, salters and coal bearers were 'by the law itself, without any paction, bound' to the perpetual service of the mines.[191] 'Sturdy beggars', 'vagabonds', 'whores' and 'theives [sic]' were, as a result of penal servitude, deprived of their liberty and 'kept at hard work'[192] and, along with colliers and 'indigent' children, categorised as 'necessary' servants in Erskine's schema.[193] Like Forbes, then, Bankton and Erskine both acknowledged that Scots law recognised a status of 'quasi-slavery';[194] nevertheless, all were equally clear that Scotland (nor indeed any other 'Christian country) did not countenance slavery.[195]

Bankton and Erskine did, however, differ as to the legitimacy of perpetual servitude in the absence of any statute providing for such. Bankton discountenanced the notion as 'against natural liberty',[196] whereas Erskine found that there was 'nothing repugnant either to reason, or to the peculiar doctrines of Christianity, in a contract by which one binds himself to perpetual service under a master, who, on his part, is obliged to maintain the other in all the necessaries of life'.[197] In support of this assertion, Erskine referred to the work of the Dutch jurist Grotius,[198] making explicit his credentials as a

[182]A MacDouall, Lord Bankton *An Institute of the Laws of Scotland in Civil Rights.*

[183]Bankton *Institute*, above n 182, I, 2, 80.

[184]Bankton *Institute*, above n 182, I, 2.

[185]Bankton *Institute*, above n 182, I, 2, 1.

[186]Bankton *Institute*, above n 182, I, 2, 1.

[187]Sir Thomas Wood, *An Institute of the Laws of England* (London: Henry Lindtot, 8th edn, 1754) p 11.

[188]Bankton *Institute*, above n 182, I, 2, 80.

[189]Bankton *Institute*, above n 182, I, 2, 82.

[190]Bankton *Institute*, above n 182, I, 2, 82.

[191]John Erskine of Carnock *An Institute of the Law of Scotland* vol 1 (Edinburgh: John Bell, 1773) Book I, Tit VII, ch 2, para 60.

[192]*Great Body*, p 322; Erskine *Institute*, above n 191, I, 7, 2, 60.

[193]Erskine *Institute*, above n 191, I, 7, 2, 60.

[194]To use Forbes' words: see *Great Body*, p 322.

[195]Bankton *Institute*, above n 182, I, 2, 80; Erskine *Institute*, above n 191, I, 7, 2, 62. Erskine did, however, recognise the status of 'negroes bought for the use of the European settlements in the Indies' to be of 'slavery' in the proper sense.

[196]Bankton *Institute*, above n 182, I, 2, 83.

[197]Erskine *Institute*, above n 191, I, 7, 2, 62.

[198]Hugo de Groot (Grotius) *De Iure Belli ac Pacis* (Amsterdam: Joannem Blaev, 1690) 2.c.5.27.

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natural lawyer.[199] Bankton, on the other hand, founded his claim on positive Scots law, referring to the authority of the case of *Allan and Mearns*.[200] Therein, it was found that the practice of astriction to the mines, and the 'quasi-slavery' of those *adscriptitii*, was permissible only as a result of statutory authority. Thus, in the absence of any authorising statute, when a number of tacksmen contracted so as to astrict themselves, 'as *adscriptitii* or *villani*', to their fishing boats, the court reduced the contract on the grounds that such was an impermissible affront to liberty.[201]

There was, however, one criminal case in which a Scottish court implicitly recognised that a Bengali girl was a 'slave', and not merely some kind of *adscripta* or other such servant.[202] As Professor Cairns notes, however, in that case 'there was no discussion of the legality of that enslavement or of the nature of that slavery'.[203] In a number of eighteenth century civil cases, culminating in *Knight v Wedderburn*, the question of the status of 'slaves' was called before the Scottish courts;[204] each of these cases included comparative discussion of Roman law and it is notable that the two 'freedom cases' (*Sheddan* and *Dalrymple*) were inconclusive due, in each case, to the deaths of one of the parties.[205]

The litigants in *Sheddan* and *Dalrymple* each sought to test the proposition that a slave who was brought to Scotland was to be deemed free upon arrival. Though the court in *Sheddan* was generous enough to note that the 'slave' was ultimately to be deemed 'free' at the conclusion of that case, this was only because it was deemed death was sufficient to 'free the servant from bondage'.[206] Lord Kilkerran recorded that the Senators of the College of Justice were 'generally inclined to find that the negro was not manumitted by his being brought to Scotland',[207] shedding some doubt upon Scots law's formal institutional repudiation of the concept of slavery at the time of this case. In the case of *Dalrymple*, the 'slave' was ultimately deemed free, though only as a result of the death of the pursuer.[208] Still, in defence, Spens – the defender – claimed that he was freed by his baptism as a Christian and that 'by the Laws of this Christian land there is no Slavery nor vestige of Slavery allowed'.[209] In spite of this, as the material concerning this case is rather fragmentary, it is difficult to discern what the court might have made of Spens' argument and so nothing concrete can be concluded from the occurrence of this case.[210]

Though the Institutional writers were explicit in their condemnation of slavery, 'in the proper sense',[211] their sources were inconsistent as to the position of perpetual servitude in Scots law. Save Stair, who made no mention of those astricted to the mines, the Scottish jurists accepted that servitude for life was recognised where such was provided for by statute; each agreed that those placed in any form of legal servitude were 'persons' in the eyes of the law,[212] and manifestly not slaves, but were

[199]See N MacCormick *Legal Reasoning and Legal Theory* (Oxford: Clarendon, 1984) p 61. As MacCormick discusses, the Scottish Institutional writers were, to a man (and ironically, given their present status as sources of positive law) representatives of the 'natural law' school of legal thought.

[200]*Allan and Mearns v Skene of Skene and Burnet of Monboddo* (1722) Mor 9454.

[201]Ibid.

[202]*HM Advocate v Bell or Belinda* (1771) NRS JC23/193; NRS, JC11/28.

[203]Cairns, above n 98, p 69.

[204]Cairns identifies *Robert Sheddan v A Negro* (1757) Mor 14545, *Houston Stewart Nicholson v Mrs Stewart Nicholson* (1770) Mor 16770 and *Dalrymple v Spens* (1770) NRS CS236/D/4/3 as relevant pre-*Knight* cases concerning the definition of slavery as it was understood in the eighteenth century: see Cairns, above n 98, pp 68–69.

[205]Cairns, above n 98, pp 69–70.

[206]'*Mors ultima linea rerum*. There the servant shall be free from his master. The poor young man is dead, and so has put an end to the question, what influence Christian charity or love to our neighbour, whatever his colour is, ought to have': *Robert Sheddan v A Negro* (1757) Mor 14545.

[207]Ibid.

[208]This, of course, implies that *Spens* was not regarded as a 'thing' by Scots law. Had he been a slave 'in a proper sense', ownership of him would have logically fallen to Dalrymple's heirs in line with the law of succession.

[209]Details of the *Dalrymple v Spens* litigation can be found on the National Archives of Scotland website: see webarchive.nrscotland.gov.uk/20170106030431/http://www.nas.gov.uk/about/061010.asp.

[210]See the discussion in Cairns, above n 98, p 70.

[211]To paraphrase Bankton: Bankton *Institute*, above n 182, I, 2, 80.

[212]As Cairns notes, the judges in *Knight v Wedderburn* must have 'classified Knight as coming under the law relating to *personae* not that relating to *res*' since 'had they not done so, the Act of 1701 [the Liberation Act, or Act Anent Wrongous

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divided as to the criteria necessary to allow for one to be legitimately bound by law to labour for life (or for decades). This final point merits further discussion; as the arguments made by counsel in *Stewart Nicholson v Stewart Nicholson* indicates, the uncertain status of 'servitude for life' allowed scope for the question of a colonial slave's 'freedom', in the Roman sense of slavery, to be, potentially, rendered moot.[213]

(c) Slavery, servitude and astriction: a distinction without a difference?

That the status of 'servitude for life' was potentially recognised as legally legitimate allowed for counsel to argue that a master of a colonial slave, in Scotland, did not possess the incidents of 'ownership' over the slave (at least for as long as the slave was outwith the jurisdiction of the colonies),[214] but nevertheless retained a right to the services of his slaves. 'Jamaican slavery was very like the Roman, the essence being the type of possession or control associated with ownership', but one who is bound to perpetual servitude 'is in no real sense owned, just as the monarch did not own the sailors compelled by the press gang to serve in the Royal Navy'.[215] This technical distinction between the status of slavery 'in a proper sense' and that of one of perpetual service might be thought merely pedantic; in practical terms, one can only imagine that informing an *adscriptitii* that he was not technically a 'slave' or the 'property' of his master would be of cold comfort if he were nevertheless expected to labour for life, for the benefit of his 'master', without the hope of improving his circumstances.

The courts and legal practitioners of the eighteenth century were alive to this fact; although this conception of 'slavery' did not adhere to the true 'classic meaning of slavery as it has been practised for centuries' (since the attendant powers possessed by the 'master' were lesser than those enjoyed by as Roman *dominus*), ultimately the courts came to hold that 'perpetual service, without wages, is slavery'.[216] Nevertheless, the ability to distinguish between the concept of Roman slavery, despotic in the letter of the law as well as in practice, and the lesser juristic concept of perpetual servitude, tyrannical in practice, though ostensibly more liberal than the explicitly repressive Romanistic regime, allowed those who were uncomfortable (for whatever reason) with the idea that one human being might 'own' another to equivocate on the issue of colonial slavery. Indeed, further to this, it allowed those who were explicitly in favour of the practical outcome of slavery to take public face against it without necessarily prejudicing their financial interests. Such occurred in the case of *Knight v Wedderburn* itself; in arguing for his entitlement to return his 'servant', Knight, to the colonies, Wedderburn's counsel contended that 'it is almost unfair even to quote the word slavery against [Wedderburn]'.[217] Though the Scottish institutional writers had each turned their faces against 'slavery' in its 'classical' sense, eminent jurists such as Stair and Erskine had explicitly enjoined the possibility of de facto slavery by recognising the legitimacy of contracts for perpetual service 'under whatever conditions were agreed, including service for necessaries without pay'.[218] Such allowed the Lord President (Dundas) to opine, along with Lord Elliock in *Knight*, that there was no moral or legal objection to the notion of perpetual, unwaged, servitude.[219]

Imprisonment] would not have been applicable to him… because he had to be a "person" to be covered by the provisions of the statute': see Cairns, above n 98, p 81.

[213]See Cairns, above n 98, p 74.

[214]Cairns, above n 98, p 79.

[215]Cairns, above n 98, p 82.

[216]JS More (ed) *Stair's Institutions of the Law of Scotland* vol I (Edinburgh: Bell and Bradfute, 1832) p 19.

[217]ALSP *Information for Joseph Knight, a Native of Africa, Pursuer in the Action at his Instance; Against John Wedderburn of Ballandean, Esq, Defender* (25 April 1775) p 38.

[218]Cairns, above n 98, p 75.

[219]Lord Hailes *Decisions of the Lords of Council and Session: From 1766 to 1791* vol II (Edinburgh: William Tait, 1826) pp 778–779. Lords Monboddo and Covington went further and took the view that Knight remained a slave in the Roman sense of that term.

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The Lord Justice-Clerk (Thomas Miller, then styled Lord Barskimming and later Lord Glenlee, with whom the majority agreed), however, rejected this notion; indeed, he was unequivocal in ruling that 'the law of our land does not allow an express covenant, even of consent, for a servant to serve for life without wages'.[220] In this, he implied a preference for both Bankton and precedent,[221] as discussed above. Later editions of the respective *Institutions* of Stair and Erskine would retain the comments of the original authors endorsing the possibility of perpetual servitude falling short of 'slavery' in its classical sense, however each contained a proviso to the effect that such did not accurately represent the law of Scotland. More's edition of Stair's *Institutes* includes a footnote suggesting that liberty was 'formerly' an alienable right;[222] Ivory's edition of Erskine, for its part, notes that 'it has [since] been absolutely decided, that a slave, brought from the plantations, acquires his freedom on coming to this country',[223] with this proposition being justified by reference to *Knight*.

The definition of 'slavery' was, then, understood to be broader in the late eighteenth century than it was in Roman law and, indeed, modern international law.[224] With that said, however, for the status of 'slavery' to exist, there nevertheless required to be some *legal* recognition of the master-'slave' relationship. As counsel for Knight argued, 'many have defined slavery to be a title to the industry of another; and this indeed is the essence of slavery, and whips, and chains, and tortures are only its attendants'.[225] Arbitrary force might bring about de facto 'slavery', in a non-technical sense, but this status would not receive recognition in the courts. It would be no more than an unlawful detention, with the attendant cruelties and tortures being regarded as further and additional delicts.[226] Thus, in the absence of 'title' (whether proprietary or contractual) allowing the 'master' some claim to the labour of the 'slave', the purported master would simply be regarded as a delinquent who had illegally affronted the personality interests of the person detained.[227]

Since the legal condition of 'slavery' could not arise absent judicial recognition of either a 'master's' exercise of *dominium* over his slave per the 'classical' definition, or of the lawfulness of unremunerated perpetual servitude per the eighteenth century conceptualisation, it would appear that the decision of the Court of Session in *Knight* rendered it wholly impossible for an individual to contravene the 'slavery' provision of s 4 in the 2015 Act. Certainly it can be concluded that the status of those astricted to the mines, or otherwise bound to labour for life, could well fall within the definition of 'servitude' within the context of the modern legislation, since such individuals were consistently recognised as juristic persons, though they were subject to the 'particularly serious' denial of liberty attached to the status of serfdom. In spite of this fact, however, due to the very recognition of their juridical 'personhood', the astricted miner could not be described as a 'slave' within the terms of the legislation, as they were not 'owned' as is presently required by s 4. Indeed, even under the expansive later eighteenth century definition, the miners in question would not be 'slaves' as, though they were bound to labour

[220]Hailes, above n 219, p 778.

[221]See above. Neither Bankton nor *Allan and Mearns* are cited by the court, however.

[222]More, above n 216, p 19.

[223]See J Ivory (ed) *Erskine's Institute of the Law of Scotland* vol I (Edinburgh: Bell and Bradfute, 1824) p 210.

[224]See J Allain 'The legal definition of slavery in the twenty-first century' in Allain, above n 31, p 199.

[225]ALSP, above n 217, p 38.

[226]Or crime/delicts: see J Blackie and J Chalmers 'Mixing and matching in Scottish delict and crime' in M Dyson *Comparing Tort and Crime: Learning from across and within Legal Systems* (Cambridge: Cambridge University Press, 2015) p 286.

[227]At common law, this affront might have been regarded as a *crimen privati carceris*, itself a nominate sub-category of the *iniuria realis* (a species of the Romanistic delict *iniuria*, received into Scots law as the crime/delict 'injury': see J Blackie 'Unity in diversity: the history of personality rights in Scots law' in NR Whitty and R Zimmermann *Rights of Personality in Scots Law: A Comparative Perspective* (Dundee: Dundee University Press, 2009) pp 111–113). *Crimen privati carceris* had fallen out of fashion by the latter half of the eighteenth century, since the Act of 1701 (which remains in force today), and the remedy afforded for 'wrongous imprisonment' under this statute, came to be the preferred alternative for litigants: J Blackie 'The protection of corpus in modern and early modern Scots law' in E Descheemaeker and H Scott *Iniuria and the Common Law* (Oxford: Hart Publishing, 2013) p 160. Knight, in his case, (successfully) relied upon the Act 1701 in his pleadings.

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in perpetuity, they were not unwaged and were, in fact, rather well remunerated for the work that they were bound to carry out.[228]

An unwaged perpetual servant, though, would likewise not be recognised as a 'slave' under the 2015 Act, even in spite of the fact that the courts of the eighteenth century would have recognised this person's condition as one of slavery (were the 'master' to hold claim to lawful title to the labour of the slave). Though the 'slave', in this context, is recognised as a 'person' (P_* and so potentially P_2 within the context of the 2015 Act) and so ostensibly within the remit of s 4, the 'master' (P_1) does not, here, hold genuine rights of ownership over P_2. Thus, (I) – a necessary component for a conviction under the legislation – cannot be demonstrated and it becomes apparent that – though undoubtedly imperfect – the definition of 'slavery' recognised by the Court of Session in the eighteenth century is, in fact, broader than that which now subsists in twenty-first century Scotland. In any case, s 4 remains of no utility to one kept in 'slavery' under either of these definitions, since all 'slaves' are instantly freed upon arriving in the jurisdiction of the Scottish courts and so their status or condition of 'slavery' ceases to abide at that time.

3. 'Slaves' in the twenty-first century

The definition of 'slavery' has been settled as a matter of international law since the 1926 Slavery Convention held that it was to be understood as 'the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised'.[229] This rather narrow definition has, in part, served as a bulwark against the overly-broad definitions of the term which began to proliferate throughout the twentieth century and led to worries that the word might be rendered effectively meaningless.[230] Though the definition is perhaps commendable for this reason,[231] there is still 'no escaping the fact that the [Convention definition] emerged at the height of European imperialism *qua* colonialism' and that it 'was meant to be applicable, in the main, to the "Other" [ie only to those who were not members of the League of Nations]'.[232] The Convention definition – received into European human rights law as it was – then serves as a means of penalising states which enjoin slavery, rather than as a means of protecting private persons from being maltreated or dehumanised by other private persons.

While, then, as a matter of international law, the United Kingdom could be said to fail in its obligation under Article 4 of the ECHR if it permits one person to claim ownership of another within the context of any of the UK legal systems – and indeed, the Scottish Parliament would not be competent to introduce any law re-instituting slavery within its jurisdiction[233] – it ultimately appears that Article 4, in these terms, does not provide direct protection to individuals who have been kept in 'slavery' by private persons. Protection for individuals who are enslaved de facto (as opposed to *de iure*) is afforded – as it was in the eighteenth century – by the common law of, and legislative enactments pertaining to, the protection of personality rights.[234] One who holds another in a status analogous

[228]See CA Whatley 'Scottish "collier serfs", British coal workers? Aspects of Scottish collier society in the eighteenth century' (1995) Labour History Review 66 *passim*.

[229]See H Cullen 'Contemporary international legal norms on slavery' in Allain, above n 31, p 304.

[230]See J Allain and R Hickey 'Property and the definition of slavery' (2012) ICLQ 915 at 916; S Miers *Slavery in the 20th Century: The Evolution of a Global Problem* (AltaMira Press, 2003) p 453.

[231]Indeed the International Research Network on Slavery as the Powers Attaching to the Rights of Ownership achieved a consensus that 'the definition of slavery available within the existing international legal framework that provided the greatest clarity and usefulness was that given in the 1926 Slavery Convention': see K Bales 'Slavery in contemporary manifestations' in Allain, above n 31, p 282.

[232]Allain, above n 224, p 199.

[233]The Scottish Parliament is bound to comply with the ECHR by dint of s 57 of the Scotland Act 1998. Any legislation to legalise the ownership of human beings could consequently be struck down by the courts.

[234]Professor Reid has commented that 'wrongful detention by private persons now occurs only rarely' (see EC Reid *Personality, Confidentiality and Privacy in Scots Law* (Edinburgh: W Green, 2010) para 5.48) although it might be more accurate to simply state that cases concerning such now occur only rarely.

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to slavery might be pursued, with considerable likelihood of success, in the civil courts and prosecuted for depriving a person of their liberty in the criminal courts.[235] For slavery to be functionally criminalised as a *nomen juris*, as was intended with the passing of (what is now) s 4 of the 2015 Act, Parliament would have to pass legislation which paints the offence with a broader brush than the ECHR. At present, both international law and domestic Scots law bind the definition of 'slavery' to the existence of a legal institutional framework of 'ownership'. This, as demonstrated, is a more restrictive definition than had begun to emerge in eighteenth century Scotland, which recognised that compelling another to perpetual servitude without wages was simply 'slavery', though this did not adhere to the 'classical' definition of that term.

That the 1926 Convention applied a more restrictive definition of 'slavery' than that which had emerged in the eighteenth century is unsurprising. The Convention, though ostensibly humanitarian, was designed so as to serve the 'political interests of the colonial powers amongst the original signatories to [it]'.[236] By defining 'slavery' in the classical Roman sense, the European powers were able to 'virtue-signal' to the 'uncivilised' nations of the world, by condemning a practice which they themselves had proscribed. From the mid-nineteenth century, the eradication of 'slavery', in this sense, in the 'backward' regions of the world had come to be viewed as an element of the 'white man's burden' which resultantly justified further colonial expansion.[237] By strictly confining the definition of 'slavery' to the understanding of that term as emerged from Roman law, colonialists were able to impose systems of labour which were as, or more, brutal than 'slavery', but which were not proscribed as they did not institutionally reify those subject to such regimes.[238]

Although other international instruments, such as the United Nation's Supplementary Convention in 1956,[239] went further than the 1926 Convention in obliging signatories to abrogate serfdom, debt-bondage and other such conditions, the definition of 'slavery' remained unchanged in such instruments.[240] The ECHR has continued in like vein, by co-opting the definition of 'slavery' as presented in the 1926 Convention without seeking to expand it beyond situations in which a nation-state institutes a legal regime in which certain human beings are institutionally reified and recognised, as a matter of law, as being 'owned' by others. As an international instrument, this position is defensible, notwithstanding the problematic context in which the drafters of the 1926 Convention settled on the definition of 'slavery'. At an international level, there ought to be a customary proscription of 'slavery' in the Roman sense; no state should be permitted to introduce (or re-introduce) such an abomination within its national law.[241] With that said, however, 'modern slavery', which the 2015 Act (and the equivalent legislation in England and Wales) seeks to proscribe, is a phenomenon which is evidently distinct from both Roman slavery and the slavery of the Americas and European colonies. As O'Connell-Davidson observed, 'the legalistic approach to the definition of slavery worked perfectly well for anti-slavery campaigners prior to the abolition of chattel slavery',[242] but 'in a post-abolition world no one can "be" a slave in the strictest nineteenth-century sense of occupying a legally recognised status category of person as property'.[243] Accordingly, in constructing a legal definition of

[235]See GH Gordon *The Criminal Law of Scotland* Vol II (Edinburgh: W Green, 4th edn, 2017) by James Chalmers and Fiona Leverick, para 33.51.

[236]J O'Connell-Davidson *Modern Slavery: The Margins of Freedom* (Palgrave-MacMillan, 2015) p 34.

[237]O'Connell-Davidson, above n 236, pp 32–33.

[238]O'Connell-Davidson, above n 236, p 33.

[239]UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956.

[240]See S Drescher 'From consensus to consensus: slavery in international law' in Allain, above n 31, p 99.

[241]Note that as interwar Germany was a signatory to the 1926 Convention, the Nazi leadership was in contempt of international law and consequently the Reich's leadership was charged with, and convicted of, crimes against humanity for its institutional re-introduction of Romanistic slavery in Nazi Germany: see Drescher, above n 240, p 100.

[242]O'Connell-Davidson, above n 236, p 32.

[243]RJ Scott 'Under color of law: Siliadin v France and the dynamics of enslavement in historical perspectives' in Allain, above n 31, p 162.

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'slavery' in domestic law, national legislatures must recognise the limitations of the present definition which subsists in international law.

In recognition of this fact, it is here submitted that the rights set out in the ECHR should not be regarded as the 'gold standard' of rights which might be afforded by law; rather, those rights should be properly viewed as the *minimum* standard of rights which a legal system should be expected to uphold. Indeed, as Lord Bingham observed in the 2004 case of *R v Special Adjudicator, ex p Ullah*, 'the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.[244] In like vein, it might be said that it is the duty of national legislatures to go beyond the letter of the Convention in implementing legislation to protect the human rights and interests of all in society.[245] As such, rather than taking the ECHR definition of 'slavery' as the starting point, the Scottish Parliament should instead take time to consider the precise nature of the harm that it wishes to criminalise by legislation of this kind. In doing so, it should be plain to see that the harm caused by modern slavery is not the same as that perpetrated by the Romans, or by European colonial ventures, but rather that it is a harm of an altogether more insidious kind. Such requires the legislature to consider, in detail, the nature of the wrong which it seeks to proscribe before ultimately coming up with its own definition of the term 'slavery', in order to ensure that the particular wrong is indeed thus prohibited. A necessary element of this, it is thought, is the decoupling of the understanding of 'modern slavery' from the 'classical' definition which remains fundamentally predicated upon the existence of a legal regime allowing 'ownership' of human beings.

As Bales notes, 'slavery is, first and foremost, a state of being – not a legal definition'.[246] To tackle the issue of 'modern slavery', however, some kind of legal definition is required. Although it might be contended that the horrors of colonialism are such that the term 'slavery' should not be diluted by expanding to include situations other than those in which there is anything less than an institutional denial of the personhood of human beings,[247] if any legislative provision akin to s 4 of the 2015 Act is to have any legal effect, and not serve as mere headline-grabbing window-dressing, the definition of 'slavery' must expand beyond the limited, 'classical', sense in which it is used in international law. Indeed, to be effective, any such definition must be decoupled not only from questions of 'ownership', but from wider questions of legal title, as the situation in respect of the eighteenth century Scottish conception of 'slavery' makes clear. If, in order to prove that a 'person' held another in 'slavery', one must prove that the law recognises some lawful relationship between those persons, the prohibition becomes, axiomatically, oxymoronic. For that reason, it is here submitted that the definition of 'slavery', within the terms of the 2015 Act, might be more effective if it were understood to amount to the occurrence of a situation in which, through their actions in depriving another person of their liberty, a person *purports* to hold another person as their 'property', treating them as though they held the status of 'slave', or otherwise *purports* to exercise rights of ownership over that person.

It is not here suggested that the above amounts to an ideal definition of 'slavery'. It is simply posited that acceptance of this definition – or one like it – would avoid the issues, which have been identified in the course of this paper, attached to the present definition in international and domestic Scots law as it stands. Under such a definition, there would be no need to prove that there existed any recognised legal relationship between the 'master' and 'slave'; likewise, that the law recognises the 'slave' as a 'person' would not be problematic, since the proposed definition would not require there to be a juridical denial of the 'slave's' 'personhood', as is presently required. What is key, to any legal definition of 'slavery' in national law, is that the practical reality of the 'slave's' experience should be placed at the centre of that definition. As Patterson recognised, slavery is characterised by 'the absolute power (in *practice*)

[244][2004] UKHL 26 para 20.

[245]It is worth noting, at this juncture, that per s 6 of the Human Rights Act 1998, the courts may be bound to have due regard to the ECHR in any case concerning s 4 of the 2015 Act even in the absence of subsection (2), since the courts cannot presently 'act in a way which is incompatible with a Convention right'.

[246]'Professor Kevin Bales's response to Professor Orlando Patterson' in Allain, above n 31, p 360.

[247]As O'Connell-Davidson notes, 'in practice anti-slavery advocacy has largely framed slavery as a *uniquely* appalling phenomenon' (present author's emphasis): see O'Connell-Davidson, above n 236, p 31.

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[present author's emphasis] of the master over his slave, the latter becoming merely an extension of the will and household of the former' as well as 'the deracination and socio-cultural isolation of the slave'.[248] Such can be practically demonstrated in the absence of any institutional or legal recognition of the relationship between 'master' and 'slave':[249] By emphasising that a simulacrum of 'ownership', rather than actual legal ownership, will suffice to establish 'slavery', as is suggested here, the courts would not be bound to hold that 'the definition of slavery involves … rights of ownership' and thus that 'there was no evidence [and could not possibly be evidence] upon which they could hold that the complainer had been held in a state of slavery', as was found to be the case in *Miller*.

In any case, whether the author's proposed definition is deemed acceptable or not, it is clear that, presently, the definition of 'slavery' contained within the 2015 Act is not fit for purpose. Within the terms of the legislation as it presently stands, it is not possible for a court to ever convict anyone who is charged with holding another human being as a slave. Such is made clear by the decision of the court in *Miller*; due to the letter of the law as set out in the 2015 Act, the court had no choice but to link the concept of slavery to the legal conception of 'ownership'. Since Scots property law remains rooted in Roman jurisprudence, there was no scope for the courts to make use of a purposive interpretation of the 2015 Act – the 'definition of slavery… involves rights of ownership' and, since Scots law knows of a defined concept of 'ownership', there *could be* no evidence that the accused therein held another 'person' as a slave. As such, when the time comes for Human Trafficking and Exploitation (Scotland) Act 2015 to be reviewed, it is plain that the legislature must do more to ensure that the wrong which they wish to proscribe is adequately defined within any subsequent legislation. The first step to take in this process is clearly the decoupling of the domestic law definition of 'slavery' from the understanding of that term that has emerged in international law and international legal instruments.

Conclusion

From the above discussion, it is clear that the 2019 case of *Miller v HM Advocate* has laid bare a notable problem with s 4 of the Human Trafficking and Exploitation (Scotland) Act 2015. If slavery involves, necessarily, one human being 'being in the *legal* ownership of another',[250] then the crime of slavery cannot occur in any jurisdiction which does not juridically recognise the possibility of legal ownership of human beings. Though Scotland, like most European jurisdictions, recognised the status or condition of agrarian serfdom, this institution died out at a relatively early stage in the development of Scots law. In any case, given the narrowness of the 'classical' definition of slavery, these serfs were manifestly not slaves. Though some modern writers have described the condition of colliers and salters as akin to slavery, it appears that their lot was closer in juridical nature to serfdom. Thus, those individuals astricted to the mines were *not* 'slaves' within the 'classical' meaning of slavery as it subsisted in Roman law (and, indeed, in modern international law), since the miners were both juristically recognised as 'persons' and remunerated for their labour.

Although the Scottish academic and institutional writers of the seventeenth and eighteenth century were hostile to the institution of slavery, and consistently expressed the view that 'we have no vestige of slavery remaining in Scotland', as a result of the UK's colonial ventures (in which many prominent Scots were enthusiastic participants) slavery was something of a fact of life in eighteenth century Scotland. Nevertheless, the question of whether or not individuals were *lawfully* owned or held in slavery, in Scotland, was undecided until the 1778 case of *Knight v Wedderburn* unequivocally held not only that Scots law did not recognise the institution of slavery in its Roman sense, but also that

[248]O Patterson 'Trafficking, gender and slavery: past and present' in Allain, above n 31, p 323.

[249]As Bales notes, it is clear that 'for most forms of slavery, the fundamental powers of ownership are exactly those that can be determined to exist outside legal frameworks': see K Bales 'Slavery in contemporary manifestations' in Allain, above n 31, p 284.

[250]*Miller*, above n 2, para 17 (present author's emphasis).

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that 'the law of our land does not allow an express covenant, even of consent, for a servant to serve for life without wages'. This recognition that 'perpetual service, without wages, is slavery' meant that Scots law, since this time, has unequivocally refused to recognise the legal validity of any relationship akin to 'slavery' in an extended sense and so any individual who is held as a slave in another jurisdiction becomes free upon arrival in Scotland.

As a result of this, it is presently impossible for a private individual to engage in conduct which might see them convicted of a charge of 'slavery' under s 4 of the 2015 Act. Any individual who obtains 'ownership' of a human being in a jurisdiction other than Scotland would cease to enjoy ownership of their slave upon reaching the jurisdiction of the Scottish courts. Although this slave-owner might be liable for any number of delicts, and could be criminally liable for depriving another person of their liberty, were they to continue to act as 'master' of another human being, the *nomen juris* of slavery would not attach to conduct of this kind at present. As it stands, the definition of 'slavery' – as it subsists in international and European human rights law, and so by association s 4 of the 2015 Act – serves as a means of obliging states to refrain from instituting a legal order which recognises the legal validity of ownership of human beings.

If the Scottish government wishes to afford prosecutors the means to try cases involving 'human trafficking' or 'modern slavery' as 'slavery' in any nominate sense, the definition of the term 'slavery', within the context of the present legislation, must be revised. This paper makes no pretence to proffer the perfect definition of 'slavery' fit for the challenges we face in the modern world. The definition suggested in this paper is simply indicative of one way in which the law might progress, if it is to effectively criminalise modern slavery, as the 2015 Act intended. Whatever weight is attached to the suggestion that 'purporting' to exercise ownership over another ought to amount to 'slavery', the primary submission of the present piece simply remains a request that, when the time comes for the Scottish Parliament to review s 4 of the 2015 Act, our legislators take seriously the task which is before them and go beyond the confines of the unfit 'classical' – and ultimately regressive – definition of the term which exists as the present norm in international law.

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